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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Redevelopment of Spectrum to
Encourage Innovation in the
Use of New Telecommunications
Technologies

ET Docket No. 92-9

To: The Commission

PETITION FOR CLARIFICATION AND/OR RECONSIDERATION
OF THE THIRD REPORT AND ORDER

Pursuant to Section 1.429 of the Commission's Rules, the Utilities Telecommunications Council (UTC) hereby submits this Petition for Clarification and/or Reconsideration of the Third Report and Order (Third R&O), in ET Docket No. 92-9, FCC 93-351, released August 13, 1993, regarding the above captioned matter.^{1/} UTC generally supports the rules adopted in the Third R&O, subject to some minor modifications detailed below.

I. INTRODUCTION

UTC is the national representative on communications matters for the nation's electric, gas, and water utilities and natural gas pipelines. Approximately 2,000 utilities and pipelines are

^{1/} On September 2, 1993, public notice of the Third Report and Order was published in the Federal Register, 58 Fed. Reg. 46547. Thus, these comments are timely filed, being within the specified time period under FCC Rule Sections 1.4(b) and 1.429(d).

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members of UTC, ranging in size from large combination electric-gas-water utilities serving millions of customers to small, rural electric cooperatives and water districts serving only a few thousand customers. All utilities and pipelines depend upon reliable and secure communications facilities in carrying out their public service obligations.

Many utilities and pipeline companies operate extensive private microwave systems to meet these communications requirements. Utilities and pipelines rely heavily on private microwave facilities operating in the 1.85-1.99, 2.13-2.15, and 2.18-2.20 GHz (2 GHz) bands, and would be severely hampered in their ability to provide vital public services if they were forced to vacate these bands without an adequate "transition plan." Thus, UTC has been an active participant in this proceeding and the related proceedings dealing with the continued use of the 2 GHz band for fixed microwave.

II. ASPECTS OF THE TRANSITION PLAN MUST BE CLARIFIED OR AMENDED IN ORDER TO PROVIDE ALL INCUMBENT MICROWAVE USERS THE ASSURANCES OF THIS PLAN

A. The Commencement Date For The Two-Year Voluntary Negotiation Period Should Be Clarified

For the most part UTC is pleased with the market-based transition plan that the Commission adopted, as it is in general accord with the relocation plan first recommended by UTC in March

of 1992.^{2/} However, there are a few details in the implementation of this plan that need to be clarified or amended in order to ensure that all incumbents are provided with the protections intended by this plan.

In the Third R&O the Commission adopted a two-year fixed period of "voluntary negotiations" between emerging technology licensees and existing 2 GHz microwave users that must expire before a one-year "mandatory negotiation" period goes into effect. However, in adopting this requirement the Commission was not clear as to when this two-year negotiation period commences for the various spectrum blocks and markets to be served by emerging technologies.

The text of the Third R&O and the language adopted in the actual rules, as contained in Appendix A, Sections 21.50(b) and 94.59(b), state that the two-year voluntary negotiation period commences upon FCC "acceptance of applications for emerging technology services."^{3/} Such a rule only makes sense if all of the emerging technologies that will occupy the spectrum reserve commence licensing at the same time. Otherwise, the voluntary negotiation period offers little or no protection to 2 GHz

^{2/} UTC's "Recommended FCC Action Plan For Accommodating New Technologies" filed as an ex parte presentation in ET Docket No. 92-9 on March 24, 1992. A copy of the plan is also contained in Appendix C of the First Report and Order and Third Notice of Proposed Rulemaking in ET Docket No. 92-9, 7 FCC 6886.

^{3/} Third R&O, para. 15.

microwave licensees located in portions of the band that have not been allocated for use by specific emerging technologies, or for market areas that do not commence licensing until a later date.

In the FCC's recent decision allocating portions of the 2 GHz band for the development of personal communications services (PCS), GEN. Docket 90-314^{4/}, 60 MHz of the "spectrum reserve" (1970-1990 MHz, 2110-2130 MHz and 2160-2180 MHz) was not designated for PCS.^{5/} To tie the commencement of a voluntary negotiation period for this spectrum to the acceptance of applications for PCS licenses in other portions of the 2 GHz band would be an arbitrary and inequitable decision. The FCC should not commence the voluntary negotiation period in a particular band until it knows when and where new service licensees will require microwave spectrum so that all incumbents have the same opportunity to enter into voluntary negotiations.

Accordingly, UTC urges the FCC to clarify that the acceptance of applications for emerging technology services only triggers the two-year voluntary negotiation period for those bands and markets for which new service licenses are being

^{4/} Second Report and Order, GEN. Docket No. 90-314, adopted on September 23, 1993, the text has not yet been released.

^{5/} According to the FCC's licensing records the 1970-1990 MHz portion of this spectrum alone contains close to 1500 private microwave stations.

accepted.^{6/}

In addition, the FCC should clarify that the triggering event for the two year voluntary negotiation period is not the acceptance of the preliminary auction or lottery applications in each band, but is instead the acceptance of the formal requests for frequency assignment and licensing that occurs after the selection of tentative licensees. This clarification is consistent with the competitive bidding provisions of the Omnibus Budget Deficit Reduction Act, which contemplates use of a two-phase application process, with only "postcard" applications during the initial phase. Otherwise, substantial delays between acceptance of preliminary applications and actual selection of licensees could eviscerate any meaningful opportunity to engage in voluntary negotiations. Such a clarification would also spare incumbent 2 GHz microwave licensees the significant inconvenience of engaging in futile negotiations with a large number of unsuccessful emerging technology license applicants.

B. Tax Certificates Should Be Available Throughout The Entire Negotiation Period Not Just The Initial Two-Year Voluntary Period

UTC supports the Commission's decision to award tax certificates to 2 GHz microwave licensees that relocate to other facilities, as this will encourage negotiated relocation

^{6/} Appendix A contains a proposed revision to Sections 22.50 (b) and 94.59(b).

agreements by removing any financial disincentive to relocate due to concern over capital gains taxes on new facilities acquired during relocation. However, UTC opposes the Commission's decision to restrict the granting of such certificates to those 2 GHz microwave licensees that relocate during the initial two-year negotiation period.

Such a decision is manifestly unfair to the 2 GHz microwave licensees that are located in bands or areas of the country where emerging technologies do not develop during the initial two-year voluntary negotiation period. This restriction would also disallow the granting of tax certificates to 2 GHz microwave licensees operating in bands designated for the development of unlicensed devices since under the Third R&O's transition plan there is only a one-year period of negotiations for unlicensed bands.

Moreover, such a policy implicitly assumes that in all cases where the parties are unable to reach a voluntary agreement during the initial two-year period it is the fault of the incumbent microwave licensee. However, there could be any number of reasons why the parties would fail to voluntarily negotiate a relocation agreement other than bad faith on the part of the incumbent.

Accordingly, UTC urges the FCC to reconsider its decision to restrict the granting of tax certificates. Specifically, UTC recommends that the FCC award tax certificates in all cases unless: (1) the Commission is forced to modify the incumbent's license over the incumbent's objections, and (2) the Commission finds that the incumbent's objections were patently without merit. In the alternative, the FCC should award tax certificates for any agreement voluntarily entered during either the two year or one year negotiation periods.

III. CONCLUSION

While UTC generally supports the Commission's market based transition plan, there are a few details in the implementation of this plan that need to be clarified or amended in order to ensure that all incumbents are provided with the protections intended by this plan. UTC urges the FCC to clarify that the acceptance of applications for emerging technology services only triggers the two-year voluntary negotiation period for those bands and markets for which new service licenses are being accepted. In addition, the FCC should clarify that the triggering event for the two year voluntary negotiation period is the acceptance of the formal requests for frequency assignment and licensing that occurs after the selection of tentative licensees.

Finally, UTC urges the FCC to award tax certificates in all cases unless: (1) the Commission is forced to modify the incumbent's license over the incumbent's objections, and (2) the Commission finds that the incumbent's objections were patently without merit. In the alternative, the FCC should award tax certificates for any agreement voluntarily entered during either the two year or one year negotiation periods.

WHEREFORE, THE PREMISES CONSIDERED, the Utilities
Telecommunications Council respectfully requests the Commission
to take actions consistent with the views expressed herein.

Respectfully submitted,

UTILITIES TELECOMMUNICATIONS
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APPENDIX A

Proposed Rule Clarification (New language is underlined)

Section 94.59 Transition of the 1.85-1.99, 2.13-2.15, and 2.18-2.20 GHz bands from Private Operational-Fixed Microwave Service to emerging technologies.

* * *

(b) Private Operational-Fixed Microwave Service licensees, with the exception of public safety facilities defined in paragraph (f) of this section who will be exempt from any mandatory relocation, in bands allocated for licensed emerging technology services will maintain primary status in these bands until two years after the Commission commences acceptance of applications for an emerging technology service in the specific frequencies and geographic area of the fixed microwave licensee, and until one year after an emerging technology service licensee initiates negotiations for relocation of the fixed microwave licensee's operations, or in bands allocated for unlicensed emerging technology services, until one year after an emerging technology unlicensed equipment supplier or representative initiates negotiations for relocation of the fixed microwave licensee's operations.

Section 22.50 Transition of the 2.11-2.13 and 2.16-2.18 GHz bands from Public Mobile Service to emerging technologies.

* * *

(b) Public Mobile Service licensees in bands allocated for licensed emerging technology services will maintain primary status in these bands until two years after the Commission commences acceptance of applications for an emerging technology service in the specific frequencies and geographic area of the fixed microwave licensee, and until one year after an emerging technology service licensee initiates negotiations for relocation of the fixed microwave licensee's operations, or in bands allocated for unlicensed emerging technology services, until one year after an emerging technology unlicensed equipment supplier or representative initiates negotiations for relocation of the fixed microwave licensee's operations.

CERTIFICATE OF SERVICE

I, Janice Jones, a secretary with the Utilities Telecommunications Council, hereby certify that a copy of the foregoing "Petition for Clarification and/or Reconsideration" was hand delivered, this 4th day of October, 1993, to each of the following:

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